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NO._____

# In The
# Supreme Court Of The United States

OCTOBER TERM, 1982

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**KARL FLEISCHMANN, TRUSTEE**
*Appellant*

v.

**WETHERSFIELD PLANNING AND ZONING COMMISSION ET AL**
*Appellees*

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ON APPEAL FROM THE SUPREME COURT OF CONNECTICUT

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## JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

Is due process denied to a party to a zoning hearing who requests that he be notified in writing as to the outcome, if:

(a) a notice published three days after the decision fails to give him actual notice; and
(b) a notice in writing is mailed to him twenty-one days after the decision, and he appeals nine days from then; and
(c) his appeal to the state courts is dismissed because he did not file it within fifteen days from publication as specified by statute?

May the Connecticut state courts disregard the due process standard applicable to the facts here and established by this court in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950) and *Schroeder v. City of New York*, 371 U.S. 208 (1962) *inter alia*, by their decisions that fail to cite those cases, although the cases were cited to them?

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*The parties below were Karl Fleischmann Trustee, Appellant; Wethersfield Planning and Zoning Commission, and Jordan Lane Associates, Appellees.

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## STATEMENT UNDER RULE 28.4(c)

This shall give notice to the Attorney General of the State of Connecticut pursuant to United States Supreme Court Rule 28.4(c) that 28 U.S.C. §2403(b) may be applicable to this appeal.

## OPINIONS BELOW

The order of the Connecticut Supreme Court denying certification was issued without opinion and the order was not published.

The opinion of the Appellate Session of the Connecticut Superior Court was published in 38 Conn. Supp. 590, XLIV No. 37 Conn. Law J. 2A (Mar. 15, 1983).

## GROUNDS OF JURISDICTION IN THIS COURT

This proceeding arises from an appeal to the state courts of a zoning decision by a town planning and zoning commission. The decree sought to be reviewed is an order of the Connecticut Supreme Court entered January 26, 1983 denying a petition for certification for review of a decision of the Appellate Session of the Connecticut Superior Court.

The notice of appeal to this Court was filed March 29, 1983 with the Clerk of the Connecticut Supreme Court, and with copy to the Clerk of the Appellate Session of the Superior Court, as it is the Court possessed of the record.

Jurisdiction is conferred on this Court by 28 U.S.C. §1257(2) since the Appellant explicitly challenged below the constitutionality of the application of §8-28 Conn. Gen. Stats. See Appendix at pg. 11A. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562n4 (1980) (Opinion of Burger, C.J.). Alternatively, the Court has certiorari jurisdiction under 28 U.S.C. §1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The central question presented may be rephrased as being whether §8-28 Conn. Gen. Stats. as applied to the Appellant is in violation of the due process clause of the 14th Amendment to the United States Constitution.

### U.S. Constitution, 14th Amendment, Due Process Clause

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

### §8-28 Conn. Gen. Stats.

> Notice of all official actions or decisions, not limited to those relating to the approval or denial of subdivision plans, of a planning commission shall be published in a newspaper having a substantial circulation in the municipality within fifteen days after such action or decision. Except as provided in section 8-30, any person aggrieved by an official action or decision, including a decision to take no action, of a planning commission, or any person owning land which abuts or is within a radius of one hundred feet of any portion of the land involved in any decision of a planning commission, may appeal therefrom, within fifteen days from the date when notice of such action or decision was so published, to the superior court for the judicial district within which the municipality with such planning commission lies. . . .

## STATEMENT OF THE CASE

On September 15, 1981, the Planning and Zoning Commission of the Town of Wethersfield, Connecticut (hereinafter referred to as TPZ) held a hearing on the application of Jordan Lane Associates seeking a change of zone for an undeveloped parcel of land from B Residence to Planned Development-Town House. The parcel contains about four and one-half acres and abuts property of Karl Fleischmann Trustee, a 163 unit garden-apartment complex. Mr. Fleischmann attended the hearing and spoke at length in opposition to the change of zone. While the matter was under consideration, Leonard K. Tundermann, the Town's Director of Community Development, who acts as agent for the TPZ, exchanged correspondence with Mr. Fleischmann on a matter, of no present importance, related to the proceedings. In that exchange of correspondence, Mr. Fleischmann specifically asked in a letter dated December 9, 1981 to be notified of the outcome of the TPZ's deliberations. There is no question that Mr. Fleischmann's letter was received and understood, as appears from Mr. Tundermann's ultimate response. See Appendix at p. 12A.

The TPZ acted on December 15, 1981 approving the change of zone and in accordance with statute, §8-28 Conn. Gen. Stats., published a notice of its decision in the New Britain Herald on December 18, 1981. Mr. Fleischmann is not a resident of either Wethersfield or New Britain, does not and did not read the New Britain Herald, and this notice did not come to his attention.

On January 5, 1982, the Director of Community Development wrote a letter to Mr. Fleischmann in which he advised that responding to the request of December 9, 1981, he was giving notice of the TPZ's December 15th action. A copy of that letter is included in the Appendix at p. 12A. Nine days later, on January 14, 1982, Mr. Fleischmann filed an appeal to the Hartford Superior Court. The TPZ moved to dismiss the appeal on the grounds that a 15-day statutory appeal period ran from the December 18, 1981 date of publication and that the period

ended on January 2, 1982. In response to this motion, Mr. Fleischmann argued among other things that "The Defendant Board's notice to Plaintiff violated procedural due process,"[1] thereby timely raising in the Court of first instance the question here pursued.

The Superior Court, Dupont, J., dismissed the appeal by an unpublished decision entered April 16, 1982. The decision did not address this constitutional claim. See Appendix at p. 6A.

Mr. Fleischmann then took an appeal to the Appellate Session of the Superior Court and on July 15, 1982 filed a brief asserting that the appeal raised but one issue:

> Is notice by publication of a municipal board's decision sufficient under the due process clauses of both the United States and Connecticut Constitutions as to a party to the proceedings who has requested that he be directly advised of the outcome.

That brief cited the following cases in support of the proposition that notice by publication is insufficient as to a party to legal proceedings whose address is known to the tribunal:

> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, (1950); *Walker v. City of Hutchinson*, 352 U.S. 112, (1956); *Schroeder v. City of New York*, 371 U.S. 208, (1962); *Robinson v. Hanrahan*, 409 U.S. 38 (1972); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1973); *Shaffer v. Heitner*, 433 U.S. 186, 206 (1976); *Curtis v. Redevelopment Authority, Etc.*, 482 Pa. 58, 393 A.2d 377, 380 (1978); *Lindsey v. Greene*, 649 F.2d

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[1] Plaintiff's Memorandum of Law in Opposition to Motion To Dismiss (February 22, 1982, p. 3).

425 (6th Cir. 1981); *Stratman v. Watt*, 656 F.2d 1321 (9th Cir. 1981).

In its reply brief, the TPZ sought to distinguish those cases. The Appellate Session affirmed the decision of the trial court by its opinion entered December 24, 1982. It cited none of the authority presented to it by Mr. Fleischmann.[2] See Appendix at p. 2A.

On January 5, 1983, Mr. Fleischmann filed a petition with the Connecticut Supreme Court seeking certification by it for review of the Appellate Session's decision. The petition for certification cited the same cases as had been urged before the Appellate Session and further relied upon the failure of the Appellate Session to deal in any fashion with these cases. A brief in opposition filed by the TPZ on January 13, 1983 again sought to distinguish the cases. The Connecticut Supreme Court entered an order denying certification on January 26, 1983, and in accord with its practice, issued no opinion.

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[2] The TPZ attempted below to distinguish *Mullane* and *Schroeder* as establishing requirements for pre-hearing notice, which the TPZ asserted, differ from the due process requirements for post-hearing notice. No authority was cited for the claimed distinction. Such a distinction is untenable in principle: if a person is entitled to notice by mail before the commencement of proceedings which *may affect* his property interests, it follows that he is entitled to at least the same notice of the conclusion of those proceedings when they *have already affected* those interests, and he can only preserve them by appeal.

Thus, presented with an unpersuasive attempt to counter *Mullane* and *Schroeder*, the Appellate Session chose to apply *force majeure* and simply ignored their existence.

## SUBSTANTIALITY OF THE QUESTIONS PRESENTED

**Unless the Connecticut Supreme Court's order is reversed, Appellant will be deprived of his due process right to notice of proceedings which affect his property interests.**

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), this Court decided the question of the due process sufficiency of a New York statutory procedure permitting a trust company to pool its funds upon notice by publication to trust beneficiaries. The Court held that while such notice is constitutionally sufficient as to beneficiaries of unknown whereabouts, it is insufficient as to those whose addresses are known. In reaching this conclusion, the Court reasoned as follows:

> "Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." 339. U.S. at 318.

> "The statutory notice to known beneficiaries is inadequate not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However, it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. . . . We hold that the notice of judicial settlement of accounts required by [New York statute] is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights."
>
> 339 U.S. at 319-20.

These principles were again determinative in the case of *Walker v. City of Hutchinson*, 352 U.S. 112 (1956), where the question was whether a property owner had been adequately notified of a condemnation proceeding through publication. In holding the notice insufficient, the Court said:

> "Measured by the principles stated in the *Mullane* case, we think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In *Mullane*, we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value."
>
> 352 U.S. at 116.

Six years later, the Court reaffirmed these principles in *Schroeder v. City of New York*, 371 U.S. 208 (1962). This was a condemnation case with a procedural context very similar to that of the case at bar. Mrs. Schroeder's property had been condemned and notice had been given by publication and posting, neither of which reached her attention. Consequently, her appeal was late filed, and was dismissed below for that reason. The Court observed that her name was readily ascertainable from both land records and tax rolls and held that it was the obligation of the municipality to advise her by mail. The Court summarized the *Mullane* rule as follows:

> "The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question. 'Where the names and post-office addresses of these affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.' "
>
> 371 U.S. at 212-213.

The continuing vitality of this principle is demonstrated in its application by this Court in three more recent cases: *Robinson v. Hanrahan*, 409 U.S. 38 (1972); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1973); *Shaffer v. Heitner*, 433 U.S. 186, 206 (1976).

The case at bar involves facts requiring the application of *Mullane* principles even more compellingly than did the facts in the cases cited above in which those principles were developed:

(a) There was some room for the City of New York in the *Schroeder* case to object to the burden imposed upon it in having to consult land records and tax rolls to ascertain the names of persons entitled to notice by mail of condemnation proceedings. Even that assertion was rejected. In the case at bar, however, there had been an exchange of correspondence between Mr. Tundermann, who acts as agent for the TPZ, and Mr. Fleischmann. Mr. Fleischmann's name and address appearing on his letterhead were in the TPZ file. His letter had requested direct notice of the TPZ's decision. Indeed, written notice was ultimately given and one is left to wonder why Mr. Tundermann waited until January 5, 1982 to write a letter giving notice of a December 15, 1981 decision whose insertion in the New Britain Herald he was able to arrange as early as December 18, 1981. It is a reasonable inference

that a Director of Community Development deals on a daily basis with zoning appeals, is familiar with the statutory fifteen-day-from-publication appeal deadline and sought, by the delay beyond fifteen days in the giving of written notice, to preclude a timely appeal. But whether or not one chooses to make this inference, the conclusion is inescapable under *Mullane, Walker* and *Schroeder* that a party who provides his name and address to a municipal agency and specifically asks to be notified of its decision is entitled to await notice by mail and is not bound by publication in a newspaper which did not come to his attention.

(b) Undoubtedly, some of the trust beneficiaries in the *Mullane* case had very small account balances, and it does not appear that the *Schroeder* property was of any significant value. Appellant here, however, as the owner of a sizeable apartment complex incurs substantial exposure to financial loss as a result of the rezoning. His appeal to the Connecticut Superior Court alleged that both drainage problems and a decrease in value would accrue. There can be no question that these financial consequences constitute substantial property interests.

**A fair and expeditious disposition of this appeal would be a summary reversal and remand to the Connecticut Supreme Court. Such a disposition would strike a balance among the burdens on this Court, the interest of the State of Connecticut in evaluating the constitutionality of application of its statute, and the interest of the Appellant in receiving due process.**

The order from which this appeal is taken is the Order of the Connecticut Supreme Court issued without opinion and denying certification under Connecticut Supreme Court rules analagous to the certiorari rules of this Court. Connecticut Practice Book §3135 et seq. The petition for certification filed by Appellant with the Connecticut Supreme Court asserted in detail the same constitutional

claims as are made in the present jurisdictional statement, but nevertheless, it is entirely possible that under the pressure of its own concerns, the Court below missed the significance of these claims. Thus, the law of Connecticut now is as enunciated by the Appellate Session of the Connecticut Superior Court. Its opinion fails to cite the authority upon which Appellant has relied throughout. It may well be that this decision is itself a denial of due process enforcing a technical violation of time limits while ignoring supervening constitutional principles which render those time limits unconstitutional of application. *Gilbert v. Sowders,* 646 F.2d 1146 (6th Cir. 1981); *Williams v. Tooke,* 108 F.2d 758 (5th Cir. 1940). But whether or not the decision of the Appellate Session itself produces a separate constitutional deprivation, it is surely an incorrect statement of the law.

The first principle of law stated in the Appellate Session's opinion is that "there is no constitutional right to judicial review of the action of a planning or zoning agency. Such review exists only under statutory authority." Appendix at p. 3A. Although the opinion does not go on to discuss the implication of this initial statement of principle, it seems clear enough that the Appellate Session believed that it follows from the absence of a right to appeal that appellate procedure need not satisfy any particular standard of fairness. This is not the law.

It has long been held by this Court that although a state may have no obligation to create a right, once it has acted to create that right, its beneficiaries cannot be denied it absent a procedure which complies with due process standards. *Goss v. Lopez,* 419 U.S. 565, 572-573 (1975); *Leis v. Flynt,* 439 U.S. 438, 441 (1979) ("As this Court has observed on numerous occasions, the Constitution does not create property interests. Rather it extends various procedural safeguards to certain interests 'that stem from an independent source such as state law.' ") *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 11 (1978) (Holding

that a public utility must afford due process before terminating service, where state case law requiring "cause" before termination gave rise to a "legitimate claim of entitlement" thereby triggering the application of due process standards.)

In the case at bar, the Appellant begins with an undisputed property interest as owner of real estate abutting that which was rezoned. Even if it is true that §8-28 Conn. Gen. Stats. which authorizes an appeal to the courts is not in and of itself constitutionally compelled, nevertheless, by its enactment, the state extended the constitutionally protected interests of the Appellant to include access to the courts in order to appeal. The Constitution forbids the state to take away with one hand that which it gives with the other. Adequate notice as defined by the *Mullane* principles discussed above must apply to zoning appeals under *Goss.* A zoning appellant is surely entitled to at least as much procedural regularity as a student expelled from school, or a light company customer.

Beginning on the wrong foot as it does, the Appellate Session's opinion goes on to discuss a variety of decisions of the Connecticut Supreme Court which construe various statutory requirements of notice. But there is nothing in these cases which bears upon the central issue here presented. Certainly notice by publication is in some circumstances proper, as appears from *Shea v. State Employees' Retirement Commission,* 170 Conn. 610, 616, 368 A.2d 159 (1976) and *Jarvis Acres, Inc. v. Zoning Commission,* 163 Conn. 41, 47, 301 A.2d 244 (1972), but neither of those cases consider the contention made here that a party requesting that notice in writing be sent to him has an entitlement to that under *Mullane* and its progeny.

The Appellate Session is finally on erroneous grounds in supporting its conclusion with the observation that to hold that the appeal here was timely filed would permit long delays and presumably increase judicial caseloads. If

a personal notice is sent by a municipal agency simultaneously with its publication, then the time to file an appeal in court is the same both as to those for whom notice by publication is sufficient and those for whom personal notice is required. No increase in litigation is to be anticipated.

The foregoing account of the disposition of this case by the Connecticut Supreme Court and the Appellate Session of the Superior Court gives rise to the following conclusions:

(a) The law of the State of Connecticut as now standing is the opinion of the Appellate Session and that opinion ignores *Mullane* and *Schroeder* and the other controlling opinions of this Court.

(b) The Appellant's day in court to contest the TPZ decision has been denied him as a consequence of the unconstitutional application of the notice by publication provision of §8-28 Conn. Gen. Stats.

(c) The Connecticut Supreme Court has never considered the merits of the claim which Appellant makes; although Appellant urged the Connecticut Supreme Court to do so in his petition for certification, that Court declined without opinion.

(d) This Court can rectify the situation without increasing its own crowded docket by taking jurisdiction, summarily reversing the Connecticut Supreme Court's order denying certification, and remanding to the Connecticut Supreme Court with direction to certify the case for review and to consider it in light of the principles enunciated by *Mullane* and *Schroeder* and their progeny.

## CONCLUSION

For the foregoing reasons, Petitioner requests that jurisdiction be taken and that the appeal be disposed of as above requested.

Respectfully Submitted,

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& McWEENY
60 WASHINGTON STREET
HARTFORD, CT 06106
(203) 547-0120

Hartford, Connecticut
April 8, 1983

## CERTIFICATE OF SERVICE

I hereby certify that a copy of this Jurisdictional Statement has this 8th day of April 1983 been served upon Sabatini and Budney, One Market Square, Newington, CT 06111 and Kotchen, Ripper and Goldstein, 2264 Silas Deane Highway, Rocky Hill, CT 06067 by U.S. Mail, First Class Postage Prepaid. Service by the same means on said date is also certified upon the Attorney General of the State of Connecticut, Honorable Joseph Lieberman, 30 Trinity Street, Hartford, CT 06115 since 28 U.S.C. §2403(b) may be applicable. The foregoing constitutes service upon all parties and persons required to be served under United States Supreme Court Rule 28.

/s/ Karl Fleischmann

Karl Fleischmann
Member of the Bar of the
United States Supreme Court

No. 268269

KARL FLEISCHMANN, T'EE. : SUPREME COURT

v. : STATE OF CONNECTICUT

WETHERSFIELD P&Z COMM., ET AL. : JANUARY 26, 1983

**ORDER DENYING CERTIFICATION**

The plaintiff having filed a petition for certification and the court having considered said petition finds that it should be denied.

Whereupon it is ordered that said petition be and it hereby is denied.

BY THE COURT

/s/ Donald H. Dowling
Donald H. Dowling
Chief Clerk

NOTICE TO:
FLEISCHMANN, SHERBACOW & McWEENY
SABATINI & BUDNEY
KOTCHEN, RIPPER & GOLDSTEIN
CLERK, SUPERIOR COURT, HARTFORD
JANUARY 28, 1983

KARL FLEISCHMANN, TRUSTEE *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF WETHERSFIELD

APPELLATE SESSION OF THE SUPERIOR COURT

FILE NO. 1345

Argued October 19—decided December 24, 1982

Appeal from the decision of the defendant planning and zoning commission, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford, where the court, *Dupont, J.*, granted the defendant's motion to dismiss from which the plaintiff has appealed. *No error.*

*Karl Fleischmann,* pro se, the appellant (plaintiff-trustee).

*Vincent F. Sabatini* and *Michael P. Carey,* for the appellee (defendant).

PER CURIAM. The plaintiff has appealed to this court from the dismissal by the superior court of his appeal from a decision of the Wethersfield planning and zoning commission.

The relevant facts are as follows: On September 18, 1981, the Wethersfield planning and zoning commission heard the application of Jordan Lane Associates for a zone change for certain of its property. The plaintiff, whose property abuts the land involved in the proposed zone change, testified at the hearing in opposition to the rezoning. On December 9, 1981, the plaintiff requested the director of community development for the town to notify him of the commission's decision when it was rendered.

The commission granted the application on December 15, 1981, and had notice of its decision published on December 18, 1981, in the New Britain Herald, a newspaper of substantial circulation in the town of Wethersfield. The director of community development advised the plaintiff of the commission's action on January 5, 1982. The plaintiff filed an appeal from the decision to the superior court on January 14, 1982, which the court dismissed for the reason that it was not timely filed.

In his appeal from the dismissal, the plaintiff argues that notice by publication of a zoning commission's decision is insufficient under the due process clauses of the constitutions of the United States and Connecticut when an aggrieved person has requested personal notice of the decision. "There is no constitutional right to judicial review of the action of a planning or zoning agency. Such review exists only under statutory authority." (Citations omitted.) *Schwartz* v. *Town Plan & Zoning Commission*, 168 Conn. 20, 24-25, 357 A.2d 495 (1975).

The plaintiff's right to appeal in the present case is authorized by General Statutes § 8-28.[1] The plaintiff does not claim that the statute, in authorizing notice by publication, is constitutionally defective on its face or that the choice of the New Britain Herald does not comply with the statutory requirement that the newspaper be one with a "substantial circulation in the municipality." Rather, the plaintiff contends that due process mandates personal notice in his case because of his specific request for notification.

The fundamental requirements of due process are an "effective opportunity to be heard and *proper notice thereof.*" (Emphasis added.) *Society for Savings* v. *Chestnut Estates, Inc.*, 176 Conn. 563, 572, 409 A.2d 1020 (1979). There is no hard and fast rule defining what constitutes proper notice; rather, "due process requires that the procedure involved must be ap-

propriate to the nature of the case." *Shea* v. *State Employees' Retirement Commission*, 170 Conn. 610, 616, 368 A.2d 159 (1976). In construing the notice provision of General Statutes § 8-3 which, like § 8-28, authorizes notice by publication in a newspaper having a substantial circulation in the municipality, our Supreme Court has stated that the " 'fundamental reason for the requirement of notice is to advise all affected parties of the opportunity to be heard . . . .' What is required is not actual notice, but, rather, constructive notice." *Jarvis Acres, Inc.* v. *Zoning Commission*, 163 Conn. 41, 47, 301 A.2d 244 (1972). The intent is to notify "as much of the populace as possible." Id. This analysis applies as well to the notice provision of § 8-28 since that section extends the right of appeal to a large class of people comprised of abutting landowners affected by a zoning commission's decision and any person aggrieved by a commission's official action or decision.[2] Given the need to alert a potentially large number of people whenever a zoning commission renders a decision, notice by publication complies with the constitutional requirement of due process under these circumstances.

An additional reason to uphold the applicability of the notice provision of § 8-28 to the present case lies in the public policy considerations reflected in the setting of a specific statutory appeal period. "[A] statute such as § 8-28 fixing a rather brief time within which an appeal may be taken to the courts is designed . . . to secure, in the public interest, a speedy determination of the issues involved. . . . It would therefore be unreasonable to give to § 8-28 a meaning which would open the appeal process to delays flowing from any of the many factors which would cause a notice, seasonably given, to be long delayed in reaching the prospective appellant." *Akin* v. *Norwalk*, 163 Conn. 68, 74, 301 A.2d 258 (1972), quoting *Hubbard* v. *Planning Commission*, 151 Conn. 269, 272, 196

A.2d 760 (1963). Allowing the commencing of the appeal period to hinge upon the date of the receipt of a requested personal notice creates the spectre of unreasonable delay which the statute is intended to avoid.

It is undisputed that the defendant complied with the notice requirement set forth in § 8-28. Publication of the commission's decision on December 18, 1981, initiated the fifteen day appeal period; the plaintiff failed to file his appeal within that time. Statutory provisions limiting the time within which to take an administrative appeal are mandatory and, if not complied with, render an appeal subject to dismissal. *Royce* v. *Freedom of Information Commission*, 177 Conn. 584, 587, 418 A.2d 939 (1979).

There is no error.

DALY, COVELLO and F. HENNESSY, Js., participated in this decision.

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[1]General Statutes §8-28 provides in relevant part: "Notice of all official actions or decisions . . . of a planning commission shall be published in a newspaper having a substantial circulation in the municipality within fifteen days after such action or decision. . . . [A]ny person aggrieved by an official action or decision . . . of a planning commission, or any person owning land which abuts . . . the land involved in any decision of a planning commission, may appeal therefrom, within fifteen days from the date when notice of such action or decision was so published. . . ."

[2]See footnote 1, supra.

NO. 268269

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| KARL FLEISCHMANN, TRUSTEE | : | SUPERIOR COURT |
| VS. | : | JUDICIAL DISTRICT OF HARTFORD/NEW BRITAIN |
| | : | AT HARTFORD |
| WETHERSFIELD PZC, ET AL | : | APRIL 16, 1982 |

**MEMORANDUM OF DECISION RE: DEFENDANT'S MOTION TO DISMISS**

Plaintiff seeks to appeal a decision of the defendant Wethersfield Planning and Zoning Commission, published in the New Britain *Herald* on December 18, 1981. Defendant has moved to dismiss the action on the grounds that the appeal, dated January 14, 1982, was not filed within the statutory period, fifteen days after publication. Plaintiff claims that as a non-resident of Wethersfield he did not receive notice by publication and, therefore, the limitation should run from his actual notification by letter on January 5, 1982.

It is settled Connecticut law that the right of appeal from actions of administrative agencies is purely statutory and requires strict compliance with statutory provisions. *Farricelli v. Personnel Appeal Board,* 186 Conn. 198, 201, A.2d (1982); *Norwich Land Co. v. Public Utilities Commission,* 170 Conn. 1, 6, 363 A.2d 1386 (1975). In this case, the right to appeal the commission's decision on a proposed zoning charge derives from Connecticut General Statutes §8-28, which reads in pertinent part as follows:

> Notice of all official actions or decisions, . . . of a planning commission shall be published in a newspaper having a substantial circulation in the municipality within fifteen days after such action or decision. . . . [A]ny person aggrieved by an official action . . . , may appeal therefrom, within fifteen days from the date when notice of such action or decision was so published. . . .

Plaintiff does not challenge the commission's selection of the New Britain *Herald* as an appropriately located newspaper of substantial circulation but, rather, alleges that, as a non-resident, he does not read that paper. Thus, against the plain language of the statute, plaintiff attempts to assert an equitable right to an extension of time.

Equitable relief, in effect circumventing appeal procedures, may be granted where fraud or connivance by authorities is shown. *Doverman v. Cel-Mor Investments*, 26 Conn. Supp. 334, 335, 223 A.2d 220 (1966), but there is no such allegation in this complaint.

Nor can plaintiff base an equitable estoppel claim on the allegation that the commission "agreed" to notify him personally of its decision. He has not met the requirements for estoppel since he has not shown that he both exercised due diligence to obtain knowledge and lacked any reasonably available means to acquire such knowledge. *Lebowitz v. McPike*, 157 Conn. 235, 243, 253 A.2d 1 (1968).

In fact, plaintiff may be said to have had constructive notice of the commission's decision on the principle that "full and adequate means of knowledge ordinarily are, in law, equivalent to knowledge." *Attardo v. Ambriscoe*, 147 Conn. 708, 711, 166 A.2d 458 (1960). The court has held that publication requirements are intended to provide constructive notice to affected persons and that only constructive, not actual, notice is required, at least as to zoning

hearings. *Jarvis Acres, Inc. v. Zoning Commission*, 163 Conn. 41, 47, 301 A.2d 244 (1972).

Finally, the court has provided a policy justification for requiring compliance with time limits:

> Legislative provisions . . . fixing a relatively short time for instituting a review of the decision of an administrative agency by the courts, are necessarily designed to secure, in the public interest, a speedy determination.

*Masone v. Zoning Board*, 148 Conn. 551, 555-556, 172 A.2d 891 (1961) (Citations omitted).

Motion to Dismiss granted.

/s/ Dupont,J.
Dupont

IN THE SUPREME COURT OF THE
STATE OF CONNECTICUT

KARL
FLEISCHMANN
TRUSTEE
*Appellant,*

V. No. 268269

WETHERSFIELD
PLANNING AND
ZONING COMMIS-
SION ET AL
*Appellee*

**NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that Karl Fleischmann Trustee, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order denying certification for review of the decision of the Appellate Session, entered herein on January 26, 1983.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated at Hartford, CT this 29th day of March, 1983.

[TIME CLOCK STAMP]

DONALD H. DOWLING
CHIEF CLERK
SUPREME COURT
Mar 29 2:45 PM '83
DRAWER Z STATION A
HARTFORD, CT 06106

/s/ Karl Fleischmann

Karl Fleischmann, Attorney
for Appellant
Fleischmann, Sherbacow &
McWeeny
60 Washington Street
Hartford, CT 06106

**Certificate of Service**

I hereby certify that a copy of the foregoing notice of appeal has this day been served upon Sabatini and Budney, One Market Square, Newington, CT 06011 and Kotchen, Ripper and Goldstein, 2264 Silas Deane Highway, Rocky Hill, CT 06067 by U.S. Mail, First Class Postage Prepaid.

/s/ Karl Fleischmann

Karl Fleischmann

**Excerpt from Opinion of Appellate Session Respecting this Court's 28 U.S.C. §1257 (2) Jurisdiction.**

The following excerpt, 38 Conn. Sup. 590, 591, demonstrates that Appellant claimed in an explicit and timely fashion that application of a state statute was repugnant to the 14th Amendment, and was understood by the court below to so claim:

> The plaintiff's right to appeal in the present case is authorized by General Statutes §8-28. *The plaintiff does not claim that the statute, in authorizing notice by publication, is constitutionally defective on its face* or that the choice of the New Britain Herald does not comply with the statutory requirement that the newspaper be one with a "substantial circulation in the municipality." *Rather, the plaintiff contends that due process mandates personal notice in his case because of his specific request for notification.* (Emphasis supplied.)

[Seal]

Town of Wethersfield
505 Silas Deane Highway
Wethersfield, Connecticut 06109

January 5, 1982 Telephone (203) 529-8611

Karl Fleischmann, Esquire
60 Washington Street
Hartford, Connecticut 06106

Dear Mr. Fleischmann:

*Re: Zoning Application No. 700-81-Z*

As requested in your letter to me of December 9, 1981, I can advise you that the above-referenced application for a change of zone from B Residence to Planned Development-Town House on a parcel of 4.5 acres extending from 447 Jordan Lane southerly to the Wilbur Cross Highway was approved by the Wethersfield Planning and Zoning Commission on December 15, 1981 by a vote of eight in favor and one opposed. The zone change became effective January 1, 1982.

Sincerely,

/s/ Leonard K. Tundermann
Director of Community
Development

LKT:sp

Office-Supreme Court, U.S.
FILED
MAY 9 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1663

# In The
# Supreme Court Of The United States

OCTOBER TERM, 1982

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**KARL FLEISCHMANN, TRUSTEE**
*Appellant*

**v.**

**WETHERSFIELD PLANNING AND ZONING COMMISSION ET AL**
*Appellees*

---

**ON APPEAL FROM THE SUPREME COURT OF CONNECTICUT**

---

## MOTION TO DISMISS OR AFFIRM

---

**VINCENT SABATINI**
**SABATINI & BUDNEY**
**One Market Square**
**Newington, CT 06111**
**(203) 667-0839**
***Attorney for Appellee Wethersfield Planning and Zoning Commission***

## MOTION PRESENTED

### THE APPELLEE WETHERSFIELD PLANNING AND ZONING COMMISSION'S MOTION TO DISMISS OR AFFIRM

The United States Supreme Court should dismiss the appellant's appeal under 28 U.S.C. §1257(2) and its writ of certiorari under 28 U.S.C. §1257(3) or affirm the Connecticut Appellate Session's decision because these federal statutory provisions are not applicable to this case and therefore, cannot confer jurisdiction to this Court. Alternatively, this Court should dismiss the appellant's appeal and writ or affirm the Appellate Session's decision because the Appellate Session's decision rests upon an adequate, non-federal basis and because the appellant has failed to present a substantial federal question to this Court.

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## CONSTITUTIONAL AND STATUTORY PROVISIONS

### U.S. Constitution, 14th Amendment, Due Process Clause

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

### 28 U.S.C. §1257(2) and (3)

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of . . . a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States. . . .

### Supreme Court Rule 16(b)

> The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

**§8-28 Conn. Gen. Stats.**

Notice of all official actions or decisions, not limited to those relating to the approval or denial of subdivision plans, of a planning commission shall be published in a newspaper having a substantial circulation in the municipality within fifteen days after such action or decision. Except as provided in Section 8-30, any person aggrieved by an official action or decision, including a decision to take no action, of a planning commission, or any person owning land which abuts or is within a radius of one hundred feet of any portion of the land involved in any decision of a planning commission, may appeal therefrom, within fifteen days from the date when notice of such action or decision was so published, to the superior court for the judicial district within which the municipality with such planning commission lies. . . .

## STATEMENT OF THE CASE

On December 15, 1981, the appellee, the Wethersfield Planning and Zoning Commission ("the Commission") approved a change of zone application filed by the Jordan Lane Associates. On December 18, 1981, notice of said decision was published in the New Britain Herald, a newspaper of substantial circulation in the Town of Wethersfield.

The appellant owns property abutting the land owned by the Jordan Lane Associates. On September 15, 1981, the appellant appeared and testified at the Commission hearing regarding the zone change request. On January 14, 1982, well without the statutorily provided appeal period, the appellant served his appeal of the Commission's approval of the application.

In a Memorandum of Decision dated April 16, 1982, the Superior Court, Dupont, J., pursuant to the appellee's motion, dismissed the appellant's appeal as being untimely filed.

The appellant took an appeal to the Appellate Session of the Superior Court and submitted only one issue. That issue was:

> Is notice by publication of a municipal board's decision sufficient under the due process clauses of both the United States and the Connecticut Constitutions as to a party to the proceedings who has requested that he be directly advised of the outcome?

In its Memorandum of Decision, on December 24, 1982, in a per curiam decision, a panel of the Appellate Session of the Superior Court affirmed the trial court's dismissal of the appellant's appeal. The court interpreted the appellant's issue as follows, "The plaintiff does not

claim that the Statute (§8-28 Conn. Gen. Stat.), in authorizing notice by publication, is constitutionally defective on its face . . . Rather, the plaintiff contends that due process mandates personal notice in his case because of his specific request for notification." *Fleischmann v. Planning and Zoning Commission*, 38 Conn. Sup. 590, 591 (1983). The Appellate Session struck down the appellant's argument because, "There is no constitutional right to judicial review of the action of a planning or zoning agency. Such review exists only under statutory authority." *Schwartz v. Town Plan & Zoning Commission*, 168 Conn. 20, 24-25, 357 A.2d 495 (1975). The Appellate Session sustained the trial court's dismissal on the basis of the appellant's non-compliance with the state statute of limitations, §8-28 Conn. Gen. Stats.

On January 5, 1983, the appellant filed a petition with the Connecticut Supreme Court seeking certification for review of the Appellate Session's decision. The appellant presented only one issue, "Whether notice by publication meets due process minima as to a party to zoning board proceedings who has requested notice in writing." On January 26, 1983, the Connecticut Supreme Court issued its Order Denying Certification without comment.

## ARGUMENTS IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

**I. The United States Supreme Court does not have jurisdiction under 28 U.S.C. §1257(2) or (3) because the appellant never questioned the validity of Section 8-28 Conn. Gen. Stats. in the Appellate Session of the Connecticut Superior Court.**

28 U.S.C. §1257(2) and (3) state:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari . . . where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States. . . .
>
> 28 U.S.C. §1257(2) and (3).

The appellant never, in the lower courts, raised the issue of the constitutional validity of Section 8-28 of the Connecticut General Statutes. This was the only state statute involved in the case. Thus, the Connecticut Appellate Session of the Superior Court never ruled on the issue.

The Appellate Session was the highest court of the state in which a decision could be had in this case because the Connecticut Supreme Court denied certiorari. *Cohen v.*

*California*, 403 U.S. 15 (1970), reh. den. 404 U.S. 876 (1971); *American R. Express Co. v. Levee*, 263 U.S. 19 (1923); *Bacon v. Texas*, 163 U.S. 207 (1895).

The appellant presented only one issue to the Appellate Session: "Is notice by publication of a municipal board's decision sufficient under the due process clauses of both the United States and the Connecticut Constitutions as to a party to the proceedings who has requested that he be directly advised of the outcome?" Appellant's July 15, 1982 brief to the Appellate Session, p. 1.

The appellant never attacked the constitutional validity of Section 8-28 of the Connecticut General Statutes. Instead, he argued that its notice and time limit provisions should not be applied to his case because he requested personal notice of the Commission's decision. Appellant's July 15, 1982 brief to the Appellate Session, Conclusion, p. 9. The applicability of a statute and the constitutional validity of a statute are two separate issues. The first necessitates statutory interpretation and application. The second necessitates constitutional analysis. In *Commercial Bank of Cincinnati v. Buckingham's Executor's*, 5 How. 317 (1847), this Court found that the question decided by the state court was one of the construction of the statute and not of its validity. The Court therefore dismissed the case for lack of jurisdiction. In the case at hand, the Appellate Session construed Section 8-28, found that the statute was applicable to the appellant and therefore upheld the trial court's decision:

> Publication of the commission's decision on December 18, 1981, initiated the fifteen day appeal period; the plaintiff failed to file his appeal within that time. Statutory provisions limiting the time within which to take an administrative appeal are mandatory and, if not complied with, render an appeal subject to dismissal.
>
> *Fleischmann v. Wethersfield Planning and Zoning Commission, supra*, at 593.

The Appellate Session itself did not interpret the appellant's argument as raising into issue the constitutional validity of Section 8-28. The Court interpreted the appellant's issue as follows:

> The plaintiff does not claim that the statute in authorizing notice by publication, is constitutionally defective on its face . . . Rather, the plaintiff contends that due process mandates personal notice in his case because of his specific request for notification.
>
> *Id.* at 591.

Since the appellant did not question the validity of Section 8-28, the Appellate Session never had reason to nor did it render a decision in favor of the Statute's constitutionality. Rather, the Appellate Session rested its decision on the fact that the appellant's appeal was not timely filed in compliance with the statute. "Statutory provisions limiting the time within which to take an administrative appeal are mandatory and, if not complied with, render an appeal subject to dismissal." *Id.* at 593.

Since the appellant never drew into "question the validity of a statute of any state on the grounds of its being repugnant to the Constitution . . . of the United States," 12 U.S.C. §1257(2), and the Appellate Session never rendered a decision "in favor of its validity," 12 U.S.C. §1257(2), the United States Supreme Court cannot assert jurisdiction under §1257(2). The appellant's appeal must be dismissed. The appellant based appellate jurisdiction solely upon §1257(2) and jurisdiction in this case cannot lie under this section.

A writ of certiorari should also be denied for similar reasons. The appellant asserted only one ground, 28 U.S.C. §1257(3), for certiorari jurisdiction. However, §1257(3) confers jurisdiction if, "the validity of a State Statute is drawn in question on the ground of its being repugnant to the

Constitution . . . of the United States." 12 U.S.C. §1257(3). As established above, the appellant never drew into question the constitutional validity of any Connecticut statute. Thus, certiorari jurisdiction cannot be established on this basis, and the writ should therefore be dismissed.

## II. If the Supreme Court does determine that it has jurisdiction under 12 U.S.C. §1257(2) or (3), this Court should still dismiss the appellant's appeal and writ of certiorari because the Connecticut Appellate Session's judgment rests upon an adequate non-federal basis.

Rule 16b of the United States Supreme Court Rules states that, "The Court will receive a motion to dismiss an appeal from a state court on the ground that . . . the judgment rests upon an adequate non-federal basis."

A judgment which rests upon sufficient, independent state grounds rests upon an adequate non-federal basis. In *Herb v. Pitcairn*, 324 U.S. 117 (1944), this Court stated the following:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.
>
> 324 U.S. at 117.

Similarly, in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1976), this Court stated that, "If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed. . . ." 433 U.S. at 566.

This Court has held that an adequate and independent state ground for a state court's judgment is a state statute of limitations. Noncompliance with a state statute of

limitations is a sufficient and independent state ground which bars further review in the United States Supreme Court. See *Rodgers v. Jones*, 214 U.S. 196 (1908); *Elder v. Wood*, 208 U.S. 226 (1907); *Seneca Nation v. Christy*, 162 U.S. 283 (1895).

In *Seneca Nation v. Christy*, this Court held the following:

> The proper construction of this enabling act, and the time within which an action might be brought and maintained thereunder, it was the province of the state courts to determine . . . As it appears that the decision of the Court of Appeals was rested, in addition to other grounds, upon a distinct and independent ground, not involving any Federal question, and sufficient in itself to maintain the judgment, the writ of error falls within the well settled rule on that subject and cannot be maintained.
>
> 162 U.S. at 289-290.

The appellant's claim that federal due process mandates personal notice in his case because of his specific request for notification of the Commission's decision is the basis upon which the appellant alleges that this Court has jurisdiction over the case because the claim brings into issue the Due Process Clause of the Fourteenth Amendment of the United States Constitution. However, the Appellate Session of the Connecticut Superior Court rested its decision upon adequate, independent state grounds. The Appellate Session decided that Section 8-28 applied to the case. Section 8-28 is a state statute of limitations mandating the time limits under which certain persons are allowed to appeal the decisions of a planning commission. Since the appellant did not file his appeal within the statutory period allowed, his appeal was therefore barred.

Application of Section 8-28 to the appellant's case, thus barring his appeal because it was untimely filed is a substantial and sufficient state ground for determination of the case. The privilege to appeal from the decision of Connecticut administrative agencies such as planning and zoning commissions exists only under statutory authority. *Royce v. Freedom of Information Commission,* 177 Conn. 584, 587, 418 A.2d 939 (1979); *Tazza v. Planning & Zoning Commission,* 164 Conn. 187, 190, 319 A.2d 393 (1972). There is no inherent or constitutional right to appeal, and a statutory right to appeal may be taken advantage of only by strict compliance with the provisions by which it is created. *Schwartz v. Town Planning and Zoning Commission,* 168 Conn. 20, 24, 357 A.2d 495 (1975); *In Re Nunez,* 165 Conn. 435, 441, 334 A.2d 898 (1973); Maltbie, Connecticut Appellate Procedure, Section 1; 4 Am. Jur. 2d, Appeal and Error, Sec. 4.

Provisions in statutes fixing the time to take an appeal are designed, in the public interest, to secure a speedy determination of the issues involved. *Fidelity Trust Company v. Lamb,* 164 Conn. 126, 132, 318 A.2d 109 (1972). Such time constraints are more than mere procedural considerations; they constitute an essential part of the remedy. *Norwich Land Company v. Public Utilities Commission,* 170 Conn. 1, 6, 363 A.2d 1386 (1975). Consequently, the limitations provisions associated with administrative appeal statutes are mandatory. A party's failure to comply with them will subject his appeal to summary dismissal. *Daly v. Board of Police Commissioners,* 133 Conn. 716, 719, 54 A.2d 501 (1947).

Section 8-28 of the Connecticut General Statutes governed the appellate's appeal to the Connecticut trial court in the instant matter. That section provides "aggrieved persons" the right to appeal designated zoning decisions. Section 8-28, however, states that any such appeal must be brought within fifteen (15) days after notice of the challenged decision is published in a local newspaper of

substantial circulation in the municipality. The statute does not require that personal notice of Commission actions be given to abutters or to non-resident land owners who request it.

In the instant case, the Commission published a notice of its approval of the Jordan Lane application in the December 18, 1981 edition of the New Britain Herald. Section 8-28, therefore, compelled the appellant to commence his appeal on or before January 2, 1982. He failed to do so.

The appellant has never contended that he filed his appeal on time and in accordance with the statute. Nor has he averred that Section 8-28 is, on its face, unconstitutional. Instead, the appellant only claimed to the Connecticut courts that due process mandates personal notice in his case because of his specific request for such notice. The Appellate Session of the Connecticut Superior Court struck down the appellant's contention because "There is no constitutional right to judicial review of the actions of a planning or zoning agency." *Fleischmann v. Wethersfield Planning and Zoning Commission, supra,* at 591.

The Appellate Session's determination of the due process claim was not necessary to its ultimate holding in the case. The court only dealt with the issue because the appellant had raised it. The real basis for the court's holding that the trial court had made no error in dismissing the appellant's appeal was the applicable state statute of limitations, Section 8-28 of the Connecticut General Statutes which mandates the dismissal of the appellant's appeal because it was not filed within the fifteen (15) day period commencing upon the publication of the Commission's decision in a local newspaper of substantial circulation.

The substantial Connecticut case law supports the finding that statutory limitations to a person's right to appeal state administrative decisions are independent, sufficient state grounds for dismissing an administrative appeal. Thus, the Appellate Session's application of Section

8-28 to the case at hand is an adequate, independent state ground for affirming the trial court's dismissal of the case. Since this state ground exists and is indeed the primary reason for the case's dismissal, this Court should likewise dismiss the appellant's appeal and writ of certiorari or, in the alternative, affirm the Appellate Session's decision.

## III. The appellant's appeal and writ should also be dismissed on the grounds that the appellant failed to present a substantial federal question.

In *Deming v. Carlisle Packing Co.*, 226 U.S. 102 (1912), this Court stated that:

> In view ... of the well settled and indeed now elementary doctrine that although a record may present in form a Federal question, a motion to dismiss will be allowed where it plainly appears that the Federal question is of such an unsubstantial character as to cause it to be devoid of all merit and therefore frivolous we think it is our duty to grant a motion to dismiss. ...
>
> 226 U.S. at 105.

Such is the case at hand. The Appellant's claim that due process mandates that personal notice govern his case because he requested personal notice of the Commission's decision is a claim devoid of all merit and frivolous. "There is no constitutional right to judicial review of the actions of a planning or zoning agency. Such review exists only under statutory authority." *Schwartz v. Town Planning & Zoning Commission, supra,* at 24-25.

The appellant's due process claim is neither strengthened nor supported by the cases which he cites and discusses in his jurisdictional statement. Throughout the proceedings in this case, he has cited no cases other than *Mullane v. Central Hanover Bank & Trust Company,*

339 U.S. 306 (1950), and some of its progeny. The holding of each cited case is inapposite to the issue presented by this appeal.

Each of the cited decisions discusses the notice due a property owner of the *pendency* of a judicial or administrative proceeding to be held regarding his property or legal entitlement. Each of the cases considers the adequacy of a particular *pre-hearing* notice as an element of due process and as a guarantee of a meaningful opportunity for the property owner to be heard in the first instance. However, none of the cited cases considered, much less decided, the question of whether due process compels an administrative body to provide personal notice of its post-hearing decisions to every person who requests such notice.

In particular, the appellant's reliance on the case of *Schroeder v. City of New York*, 371 U.S. 208 (1962) is misguided. Contrary to the appellant's oft-repeated claim, the instant matter is not "very similar on its facts" to the *Schroeder* case.

*Schroeder* involved a challenge to the adequacy of the pre-taking notice provisions of New York City's condemnation rules. The instant case involves a person who attended and participated in a zoning hearing, the results of which he now seeks to contest. By way of contrast, Mrs. Schroeder received no notice of the pendency of the condemnation proceedings until long after the fact.

In the case of *Edward Balf Company v. Town of East Granby*, 152 Conn. 319, 324, 207 A.2d 58, 61 (1965), a party challenging the enactment of zoning regulations raised a *Schroeder* due process claim very much like the one made by the appellant herein. Balf admitted that the contested regulation had been adopted in accordance with the pre-hearing notice provisions of the applicable statute. *Id.* Balf claimed, however, that under *Schroeder*, since its name and

interest were known to the Town, the Town should have given it personal pre-hearing notice of the proposed regulations. The court, recognizing that due process is a fluid concept, distinguished the *Schroeder* case on its facts and rejected this argument out-of-hand. *Id.*

Similarly, in its December 24, 1982 Memorandum of Decision, the Appellate Session acknowledged that due process is a flexible notion, and wrote that, "there is no hard and fast rule defining what constitutes proper notice; rather 'due process requires that the procedure involved must be appropriate to the case.'" *Fleischmann v. Wethersfield Planning and Zoning Commission, supra,* at 591, quoting *Shea v. State Employees' Retirement Commission,* 170 Conn. 610, 616, 368 A.2d 159 (1976). Acting on this principle, the Appellate panel proceeded to hold, "Given the need to alert a potentially large number of people whenever a zoning commission renders a decision, notice by publication complies with the constitutional requirement of due process . . ." *Fleischmann v. Wethersfield Planning and Zoning Commission, supra,* at 592.

This holding is well-grounded in precedent. It has long been established that, absent a contrary statutory directive, personal notice of a zoning authority's decision is not necessary to trigger the running of the appeal period. Constructive notice, in a form designated by the enabling act, is sufficient. Rathkopf, *The Law of Zoning and Planning,* 4th Ed., Sec. 42.04(4), and cases cited therein; *Kron v. Thelen,* 177 Conn. 369, 372, 423 A.2d 857 (1979); *Jarvis Acres, Inc. v. Zoning Commission,* 163 Conn. 41, 47, 301 A.2d 244 (1977), cited by the Appellate Session at page 592; see also *Alper v. Nowakowski,* 397 N.Y.S. 2d 42, 58 A.D. 2d 1012 (1977); in which parties who appeared and testified at a zoning board hearing claimed a denial of due process when they were given only the statutorily-mandated constructive notice of the board's decision. The court upheld the board, relying on the presumption favoring the constitutional validity of legislative enactments,

which "can be overcome only by the most cogent and compelling reasons." Section 8-28 of the Connecticut General Statutes as noted, requires only constructive notice.

The appellant's due process argument simply ignores a crucial distinction between the notions of the type of notice due an effected person of the pendency of a legal or quasi-legal action, and the type of notice due a person of the resolution of that action. The Supreme Court of Errors recognized that distinction when it wrote:

> A limitation on the right of appeal must be distinguished from the right to bring a common law action, where no statute is involved creating that right.

*Norwich Land Company v. Public Utilities Commission,* 170 Conn. 1, 7, 363 A.2d 1386 (1975); see also *Tazza v. Planning & Zoning Commission,* 164 Conn. 187, 191, 319 A.2d 393 (1972), in which the court held that Section 8-28 does not grant abutters the right to notice of a pending appeal brought by an unsuccessful applicant.

A Missouri case, *Cohen v. Ennis,* 318 S.W. 2d. 310 (Mo. 1958), provides a useful insight into the issues involved in the instant matter. In *Cohen,* the owner of property abutting land regarding which a variance had been granted filed an appeal. Unfortunately, the appeal was filed late. However, Cohen claimed that the attorney representing the zoning board had promised to give him personal notice of the board's action on the variance application but failed to do so. Said failure, Cohen argued, deprived him of due process and tolled the limitations period. 318 S.W. 2d. at 314.

The Missouri Supreme Court rejected Cohen's argument and dismissed his appeal. The applicable statute required Cohen to commence his appeal within thirty (30) days of the filing of the zoning board's decision. The court

held the limitations period to be "mandatory and jurisdictional." *Ibid.* Moreover, regarding the alleged agreement to provide Cohen personal notice, the court said,

> (A)n extra-judicial statement ... concerning notice to the parties, if made, could neither modify the status nor invalidate a lawfully made order of the board. And surely, it would not bind or prejudice Continential (the applicant for a variance) in any right vested in it under the order here involved.

*Id.* at 315; see also, *Lanning Appeal*, 6 Pa. D & C 3d. 345, 349 (1978), where, in a case similar to *Cohen*, the court stated that an individual representative of a zoning authority possesses no power to extend or waive statutory provisions.

The appellant in the instant matter presents an even less compelling case than did Cohen. There exists no evidence that either the Commission or any of its agents even remotely manifested an intention to personally notify the plaintiff of its impending decision on the Jordan Lane application.

Finally, the appellant presents the contention that the Appellate Session's Memorandum of Decision is inadequate and that he is therefore entitled to further judicial review. The appellant seems to state that, because the memorandum does not discuss by name the cases he cited, it somehow failed to consider his argument.

The contention is simply factually wrong. The court expressly considered and rejected the appellant's due process claim. *Fleischmann v. Wethersfield Planning & Zoning Commission, supra*, at 591-593. While it did not recite the cases cited by the appellant, the court clearly weighed them in its decision, and concluded that they were not relevant to or determinative of the issues presented. The court

provided ample Connecticut authority for its decision, and adequately appraised the parties of the basis of its holding.

In summation, the appellant has presented an issue completely unsupported by case law. His argument also fails to present any logical reasons for creating new inroads into the federal constitutional concept of due process. Thus, the appellant has failed to present a substantial federal question worthy of the Court's consideration. This Court should therefore dismiss the appellant's appeal and writ or, in the alternative, affirm the Connecticut Court's decision on this case.

**Respectfully Submitted,**

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Dismiss or Affirm has this 6th day of May, 1983 been served upon Fleischmann, Sherbacow & McWeeny, 60 Washington Street, Hartford, CT 06106 and Kotchen, Ripper and Goldstein, 2264 Silas Deane Highway, Rocky Hill, CT 06067 by U.S. Mail, First Class Postage Prepaid. The foregoing constitutes service upon all parties and persons required to be served under United States Supreme Court Rule 28.

/s/ Vincent Sabatini
Vincent Sabatini
Member of the Bar of
the United States
Supreme Court

Office-Supreme
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NO. 82-1663

# In The
# Supreme Court Of The United States

OCTOBER TERM, 1982

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**KARL FLEISCHMANN, TRUSTEE**
*Appellant*

v.

**WETHERSFIELD PLANNING AND ZONING COMMISSION ET AL**
*Appellees*

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**ON APPEAL FROM THE SUPREME COURT OF CONNECTICUT**

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## APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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## EACH OF THE ARGUMENTS PRESENTED BY APPELLEE IN SUPPORT OF ITS MOTION TO DISMISS OR AFFIRM IS VITIATED BY A MISTAKE OF LAW OR BY A LAPSE IN LOGIC.

### I. It suffices under *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562 n. 4 (1980) that Appellant has challenged below the constitutionality of application of a state statute.

The Appellees' first argument, urging that this Court lacks either appellate or certiorari jurisdiction, was prepared without regard to the law as stated by the Chief Justice in *Richmond Newspapers*. It is sufficient that there be an "explicit and timely insistence in the state courts that a state statute, *as applied*, is repugnant to the federal Constitution, treaties or laws." (emphasis added) *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562 n. 4 (1980). The jurisdictional statement demonstrates that such a claim was in fact made and indeed on page 7 of its Motion, Appellee admits as much. The Appellee's mistake lies in its failure to go beyond the bare language of 28 U.S.C. §1257 (2) and to reach into the case law.

### II. It is logically circular to assert that a statute of limitations provides an adequate non-federal basis of decision in a case where the Appellant has challenged the constitutionality of application of that statute.

As appears from the record and the Jurisdictional Statement, Appellant has throughout this litigation asserted that the 15-day from publication limitation of §8-28 Conn. Gen. Stats. cannot be constitutionally applied to him. The gravamen of this case is that what purports to be a non-federal basis of decision runs afoul of the Constitution. Thus, the claim that the decision below rests

upon an adequate non-federal basis assumes that of which Appellee must convince this Court: that the statute was constitutionally applied.

An alternative demonstration of the fallacy of this claim lies in its absurd implication. If it were true that a state court decision purporting to rest upon a state statute were by that purport grounded upon an adequate non-federal basis, then this Court could never review a claim that a state statute had been unconstitutionally applied.

## III. The Appellant's claim that controlling precedents of this Court were ignored raises a substantial federal question.

The Jurisdictional Statement argues that the Connecticut courts have ignored controlling precedents of this Court. The Appellee makes two responses:

1. It reiterates on pg. 13 of its Motion the claim that there is a distinction between pre-hearing and post-hearing notice. Appellant anticipated and refuted this argument in the Jurisdictional Statement, pg. 5 n. 2. Moreover, no court has ever addressed this argument, much less accepted it, and it is surely a substantial basis of appeal that precedents of this Court were ignored below.

2. The Appellee cites authority from Connecticut and assorted other states for the general propositions that due process is a flexible notion and that one who lacks a constitutional right to judicial review may not claim that it has been unconstitutionally denied him. Lower court authority is hardly persuasive to rebut Appellee's claim that due process, however flexible, requires notice in writing in this case under *Mullane* et al. Nor is lower court authority persuasive to rebut the proposition that once a state has acted to create a right, its beneficiaries cannot be denied it absent a procedure which complies with due process standards. *Goss v. Lopez* et al cited in the Jurisdictional Statement, pg. 10.

## CONCLUSION

The Motion to Dismiss or Affirm lacks a basis in either law or logic. The Jurisdictional Statement sets forth grounds which are sufficient to warrant this Court to take jurisdiction, to summarily reverse the Connecticut Supreme Court's order denying certification, and to remand to that Court with direction to certify the case for review and to consider it in light of the principles enunciated by *Mullane* and *Schroeder* and their progeny.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that three copies of this Brief have this 13th day of May 1983 been served upon each of each of Sabatini and Budney, One Market Square, Newington, CT 06111 and Kotchen, Ripper and Goldstein, 2264 Silas Deane Highway, Rocky Hill, CT 06067 by U.S. Mail, First Class Postage Prepaid. The foregoing constitutes service upon all parties and persons required to be served under United States Supreme Court Rule 28, as the Connecticut Attorney General has notified the undersigned that he does not wish to "get directly involved in these proceedings."

/s/ Karl Fleischmann
Karl Fleischmann
Member of the Bar of the
United States Supreme Court